

MARY R. SULLIVAN
Registered Merit Reporter
Certified Realtime Reporter
Sullivan Court Reporting
P.O. Box 18100
Missoula, Montana 59808
406/721-2588 office
406/721-3904 fax
scr@montana.com

United States Contract Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,)	
)	
PLAINTIFF,)	
)	
VS.)	NO. CV-00110-M-DLC
)	
SCOTT RHODES,)	PRELIMINARY PRETRIAL
)	CONFERENCE
DEFENDANT.)	
_____)	

HEARD BEFORE THE HONORABLE DANA L. CHRISTENSEN
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
Thursday, April 20, 2023
1:29 p.m. to 2:41 p.m.

Proceedings recorded by machine shorthand
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A P P E A R A N C E S

For the Plaintiff: Michael Wadden
Patrick Runkle
U.S. Department of Justice
Consumer Protection Branch
450 5th Street NW, Suite 6400S
Washington, DC 20001

For the Defendant: Scott Rhodes, Pro Se
6653 Main Street
Bonners Ferry, ID 83805

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P R O C E E D I N G S

THE COURT: This is Judge Christensen. Can you hear me?

MR. WADDEN: Yes, Your Honor, we can.

THE COURT: It sounds like we've got Mr. Runkle and Mr. Wadden on the phone. Is that correct?

MR. RUNKLE: That's correct, Your Honor. Thank you.

THE COURT: Who just joined?

MR. RHODES: Defendant.

THE COURT: Okay. Mr. Rhodes, so you're on the phone with us. Can you hear me all right? This is Judge Christensen.

MR. RHODES: Your -- Your volume is a little low, but it could be my device on my end, but I -- I can hear you.

THE COURT: Okay. And my understanding, Mr. Rhodes, is we've got Mr. Runkle and Mr. Wadden on the phone as well on behalf of the plaintiff United States.

Mr. Wadden, do you expect anybody else to join the call from the standpoint of the United States this afternoon?

MR. WADDEN: I don't believe so, Your Honor.

THE COURT: Okay. We can proceed, then. Normally I would do these -- Well, not normally -- typically I would do these preliminary pretrial conferences in person, but because everybody is some distance from Missoula, I decided we would go ahead and do this by phone, save everybody the expense and

1 time of travel.

2 The primary purpose for the conference is to get a
3 scheduling order in place in this case, and I have present
4 with me -- I'm sitting in the courtroom. But I have present
5 with me my courtroom deputy and Judicial Assistant Amanda
6 Goodwin; and then my law clerk, Matt Bain; and then we have a
7 court reporter in here that's making a record of this
8 proceeding as well.

9 Let me indicate for purposes of the record that I've
10 read everything that you all have submitted in the case, I'm
11 obviously familiar with it, having already dealt with some
12 preliminary motions. But I have read the complaint, I've read
13 Mr. Rhodes' answer to the complaint, I've read the joint
14 discovery plan that's been submitted and the preliminary
15 pretrial statements so I'm up to speed in terms of where we
16 are procedurally in the case.

17 It appears to me that there was some effort made to
18 reach some agreement as to dates to complete certain tasks in
19 the case, although it's unclear to me whether these dates that
20 have been proposed through the discovery deadline have been
21 agreed to or whether or not there's some dispute as to what
22 the deadlines are to be. So maybe somebody could sort of
23 enlighten me on where we are in terms of agreement as to
24 deadlines.

25 MR. RUNKLE: Yes, Your Honor. This is Mr. Runkle

1 for the government. There -- There -- The dates that you're
2 referring to, I believe, are proposed dates that we offer --
3 that the government offered. We did have a conference about
4 that, and the conference was cordial, but Mr. Rhodes believed
5 that the discovery schedule should be, I believe, a bit faster
6 than that, so he didn't offer -- he didn't offer alternatives,
7 but I believe on that call he said something like 60 to
8 90 days. We believe something more along the lines of nine
9 months was appropriate, and those were the dates that
10 we -- that we put in the pretrial filing in the proposed
11 filing.

12 Today we would actually -- since it's been about a
13 month since we thought discovery might get off the ground, we
14 actually would like nine months from -- we're proposing today
15 nine months from -- from around now, so we would actually like
16 to move those dates back a month or so. But obviously it's
17 the -- it's the court's discretion as to how the court wants
18 to set a schedule.

19 THE COURT: Okay.

20 MR. RUNKLE: But that's -- that's the lay of the
21 land.

22 THE COURT: All right. Thank you, Mr. Runkle.

23 Mr. Rhodes, explain to me what your concern is about
24 the discovery -- the period of time for discovery.

25 MR. RHODES: My concern about the period of time for

1 discovery is that discovery is being done as a legitimate
2 interest for the purposes of the trial. I've been led to
3 understand that the average federal civil trial period is
4 about 60 to 90 days, and here I would argue it should be the
5 shorter end of that spectrum because that average includes
6 private parties, and this plaintiff is not a private party,
7 it's the federal government which did not need to wait for a
8 complaint to be filed, it began using subpoena power to do its
9 discovery. And, in fact, it's been doing discovery using
10 subpoenas since five years ago in 2018 according to the
11 plaintiff's own complaint Exhibit A.

12 According to that exhibit, it's been five years
13 since they subpoenaed the records, the Internet calling
14 platform from which the calls are supposed to have been made
15 in order to obtain a list of all numbers dialed, the account
16 holder's name, and other record information.

17 The plaintiff has already stated on page 3 of the
18 discovery plan that the case doesn't involve complex
19 discovery, so what discovery is left that's actually necessary
20 and relevant to the specific claim underlying their complaint?
21 I mean, obviously they're going to depose the defendant.
22 Fine. That doesn't take anywhere close to nine months.

23 THE COURT: Okay. Were you finished, Mr. Rhodes?

24 MR. RHODES: I am.

25 THE COURT: Okay. Well, I don't know where you got

1 the information on the 60 to 90 days, that probably wasn't
2 information that you gathered as it relates to the discovery
3 orders that I issue, but I understand the point that you're
4 making.

5 Typically what I like to do in terms of the
6 scheduling order, the most important date for me is when we
7 set the case for trial, and it's my practice to set cases for
8 trial somewhere between 10 and 14 months from the date of this
9 conference -- the preliminary pretrial conference -- which
10 is -- I'm going to propose a trial date here shortly to all of
11 you to see if it works which falls within that timeframe. And
12 then I simply back the dates up in terms of things that I
13 expect to be done to prepare the case for trial.

14 As far as when you all complete discovery, as long
15 as it's a time within the schedule that -- that we set in
16 terms of the trial and the final pretrial conference, really
17 doesn't matter to me that much, particularly since, as I'm
18 going to indicate shortly, I provide the parties with
19 considerable flexibility to modify some of these dates without
20 having to come to me to seek permission.

21 So what I intend to do, then, although -- I mean, I
22 understand, Mr. Rhodes, your point, you -- you do not believe
23 this case requires extensive discovery. Well, let me ask
24 this. Mr. Runkle, Mr. Wadden, what -- what -- what sort of
25 discovery do you anticipate needs to be accomplished here in

1 this case to get ready to be tried?

2 MR. RUNKLE: Yes, Your Honor. There are -- There
3 are a whole host of problems with discovery, essentially.
4 There are -- We have subpoenaed now some of the corporate
5 entities involved just in -- in an attempt to make sure that
6 we get all the records from them directly even though the FCC
7 already got a lot of those records, as Mr. Rhodes pointed out.

8 The second problem would be discovery of Mr. Rhodes.
9 As -- As he points out, yeah, he -- he sort of holds the key
10 to how long that may take.

11 The third prong is the one that concerned us a
12 little bit more, which is discovery of third-party witnesses
13 who receive these calls around the country. And so, you know,
14 we've identified some of them, but there are questions about
15 who -- who may be able to travel to trial. Obviously the
16 court's scheduling order will help us with that, but -- and
17 whether we need to move the case testimony at trial
18 telephonically, whether we want to depose these people, how
19 that goes. So that -- that is the issue in addition to if
20 there's any motions practice around some of the other
21 subpoenas or the other discovery that goes out that we think
22 they're -- they're -- that while it's not a completely complex
23 case and we're not advocating that it is complex, I -- I think
24 some of that stuff will take longer than the timeframe that
25 Mr. Rhodes was -- was discussing. That's -- That's our point.

1 THE COURT: Okay. Well, let me ask -- let me ask
2 another question, and then we'll get -- get some dates in
3 place here.

4 Mr. Rhodes, you have requested a -- a jury -- a jury
5 trial. There was not a jury demand contained within the
6 original complaint -- at least I didn't see one -- and my
7 question is whether or not this case is appropriate for a jury
8 trial, and if so, what issues would the jury be called upon
9 to -- to resolve in this case, what factual issues?

10 Now, let me indicate that I did do a little bit of
11 research on this subject, and I would concede that my research
12 on the subject is limited, but it was directed to the
13 threshold issue of whether a jury is available in a case of
14 this kind.

15 And the cases that I read, there were two cases that
16 I read, Tull, T-u-l-l, vs. United States. That's, admittedly,
17 an older U.S. Supreme Court case from 1987, found at 481 U.S.
18 412. I read a United States District Court case from the
19 district of New Jersey from 1981, United States Nuclear
20 Regulatory Commission vs. Radiation Technology, Inc. That
21 case is found at 519 Fed. Supp. 1266. Neither of those cases
22 involved the FCC, but they did involve issues associated with
23 the government seeking civil penalties and injunctive relief
24 under various statutory schemes, and those cases led me to the
25 conclusion that a jury trial would be available as to certain

1 aspects of this case, but not necessarily every issue in the
2 case.

3 So let me -- let me just start, Mr. Rhodes, with
4 you. You asked for a jury trial, I assume you are of the
5 opinion you are entitled to one. Did you do any research on
6 this subject or is there anything you can share with us as it
7 relates to your request?

8 MR. RHODES: Simply that I'm affirming that, yes, I
9 believe that the defendant is entitled to a jury trial, and I
10 would understand or I would like to understand that a jury is
11 not going to be able to decide matters of law, but that it
12 certainly can decide matters of fact.

13 I'd -- I'd also like to go back to talking about
14 discovery and the discovery period, if I may, and I'd like to
15 either do that now or if you'd like me to address that later,
16 I will.

17 THE COURT: No, you can go ahead 'cause we're
18 talking here about the schedule.

19 MR. RHODES: Okay. So relative to the three prongs
20 of discovery that's expected by the plaintiff that attorney
21 Runkle outlined, as far as the defendant being the key and to
22 depose him, as I said, the defendant expects that, and as to,
23 you know, it's up to the defendant how long that takes, I'm
24 not sure what's implied there, but the defendant has no
25 intention of evading a subpoena for -- or just evading

1 deposition. I don't see how that would even be practically
2 possible since ultimately the plaintiff who just now -- or the
3 court would publish in a newspaper or something the
4 requirement for the -- for the defendant to sit for it, and
5 the defendant has no intention of letting this go to default
6 judgment. So the defendant's not going to avoid the
7 deposition, so there shouldn't be any reason why that would
8 take a long time.

9 As far as third-party witnesses, I would point out
10 to the court that in terms of the recipients of these calls,
11 the value of the testimony of multiple witnesses is relatively
12 small in that it is cumulative. According to the plaintiff's
13 complaint, these 5,000 prerecorded messages that were made by
14 phone, you know, they consisted of five different recorded
15 messages, but that essentially the part -- the complaints
16 claim that all these people received the same message.

17 So what these witnesses are testifying to that's
18 relevant is "Yes, I got a call," "Yes, that was the message I
19 heard," and "Yes, that's the number it came from," for
20 example. So how many of those witnesses are really necessary
21 to make that point? It's certainly not a hundred of them.
22 So, yeah, this conjures up a whole bunch of potential
23 witnesses to go through that need -- to -- to have gain -- to
24 get their attendance and, you know, excuses, scheduling needs
25 to be made for their -- for their travel. You know, I -- I'd

1 say that the weight of that seems -- seems pretty light.

2 In terms of the window of time for discovery, you
3 know, there's two concerns, one of which I already alluded to
4 which is that the discovery in this case is being done for the
5 legitimate purposes of the -- the plaintiff seeking to prove
6 this case rather than getting discovery for the defendant
7 for -- for ulterior motives for the purposes of compiling
8 information on what some individuals in the Department of
9 Justice or the FCC consider a political enemy, and I don't
10 think that that's entirely out of the realm of possibility.

11 I alluded earlier to the involvement of the ADL as
12 part of the litigation to this case --

13 THE COURT REPORTER: I'm sorry, Judge --

14 A. -- the background --

15 THE COURT REPORTER: I need --

16 A. -- facts --

17 [Court reporter clarification.]

18 THE COURT: Mr. Rhodes, you're going to have to
19 speak a little slower because we're making --

20 MR. RHODES: Okay.

21 THE COURT: -- we're making a record of all of this.

22 MR. RHODES: All right. I didn't have that in mind,
23 so, okay, that's fine.

24 In any case, the final issue -- concern right now
25 that I can think of regarding the window for discovery is that

1 the defense intends or expects to call an expert witness,
2 which I have a question of the court later. But in any case,
3 this particular expert witness who's in his 80s. So I'm
4 trying to depend on him being alive and/or helping, be able to
5 attend and to be able to travel to Montana, and, you know, any
6 cognitive issues because of advanced age is a concern. So
7 that's the reason the defense seeks to have the trial sooner
8 than later and to shorten that period.

9 THE COURT: Okay. All right. Okay. I understand
10 all of that, Mr. Rhodes. I understand your point as it
11 relates to all of this, and I -- I do not anticipate -- and I
12 shouldn't speak for the plaintiff, and I certainly don't
13 intend to do so -- but I do not anticipate that they intend to
14 try to depose everybody that allegedly received a call. I
15 think they're seeking to probably conduct representative
16 depositions of groups that have been identified in the
17 complaint.

18 But having said that, the question is what's a
19 reasonable length of time to complete discovery in a case of
20 this kind. Quite frankly I don't view the original request of
21 a discovery deadline of December 15th as being unreasonable.
22 It fits within the time period within which I'd like to get
23 this case tried, and so I'm going to adopt as the initial
24 deadlines in the case the deadlines that have been proposed by
25 the government, and that would be May 4 as the deadline for

1 amending pleadings.

2 Now, there will be an order issued following our
3 conference today that will contain all of these dates and
4 everything that I'm going to discuss with you. But in any
5 event, that May 4, 2023 deadline for amending pleadings, that
6 is a deadline to amend without the need to seek leave of court
7 under Federal Rule of Civil Procedure 15. After this
8 deadline, if a party seeks to amend, then that party will need
9 to file a formal Rule 15(a)(2) motion.

10 In terms of expert disclosures, there was proposed a
11 disclosure of plaintiff's damage experts and simultaneous
12 disclosure of liability experts of October 15, 2023, and then
13 a disclosure of defendant's damage experts of November 14,
14 2023. Those dates are perfectly acceptable to me, so we'll go
15 ahead and include those dates. And then the originally
16 proposed discovery deadline, that being proposed by the
17 plaintiff, the United States, of December 15, 2023, that's
18 also fine with me. So we'll go with those starting dates.

19 Now, let's fast-forward to a trial setting. I have
20 available a No. 1 trial setting on April 22 of 2024, almost
21 exactly a year from now.

22 Mr. Rhodes, does that date work for you?

23 MR. RHODES: I see no reason why it doesn't.

24 THE COURT: And Mr. Runkle, Mr. Wadden, does that
25 date work for the United States?

1 MR. RUNKLE: Yes, that -- that is acceptable, Your
2 Honor.

3 THE COURT: All right. So let me ask attorneys
4 Runkle and Wadden, the question of whether there's a jury
5 available in this case or not, what's the government's
6 position on that?

7 MR. RUNKLE: Yes, Your Honor. We'd have done some
8 of the same research as the court, and we have some experience
9 in this realm doing civil penalty cases for the federal trade
10 commission. We believe Tull is the correct precedence, and so
11 our position is that there is a jury trial right along the
12 question of liability but not -- but that the court will set
13 the amount of damages.

14 THE COURT: Okay.

15 MR. RUNKLE: There would be -- Yeah, that's --
16 that's generally our position, so -- and we can brief that, if
17 necessary, but that -- that is our position, Your Honor.

18 THE COURT: All right. And your -- your view of
19 this -- When you speak, be sure to let us know who it is, and
20 I assume that was Mr. Runkle?

21 MR. RUNKLE: I apologize, Your Honor, yes, that was
22 Mr. Runkle.

23 THE COURT: Okay. Thank you.

24 Okay. So we're all -- it sounds like we're on the
25 same page that a jury is -- will -- will decide liability

1 issues in the case.

2 And so the trial setting, then, on April 22nd, 2024,
3 that would be a jury trial setting. We will have a
4 seven-person jury. As you all know, I'm sure, I'm required by
5 law to have at least six jurors for a civil case, in this case
6 I will seat seven. The seventh will not be denominated as an
7 alternate, so that individual, he or she, will deliberate at
8 the end of the case.

9 Now, how long -- and let me start with the
10 government -- how long do you think it would take to try this
11 case?

12 MR. RUNKLE: Your Honor, we believe we can try the
13 case in about a week. We think it would take a week on our
14 part.

15 THE COURT: And is that -- is that to present the
16 government's case in chief or are you anticipating the defense
17 as well in that time period?

18 MR. RUNKLE: We -- Your Honor, this is Mr. Runkle.
19 We don't know what Mr. Rhodes is planning to put on, and so we
20 can't prognosticate that, with respect, but I -- I
21 anticipate we could get our case in chief done within three to
22 five days, let's -- let's put it that way.

23 THE COURT: Okay. And Mr. Rhodes, you probably
24 don't know yet exactly what your case looks like from a
25 defense standpoint, but do you have any -- any idea at all how

1 long it would take you to present your case?

2 MR. RHODES: This is the defendant. I'm not an
3 attorney, I've actually got no court trial experience or legal
4 experience so I have no -- no way to professionally judge. I
5 imagine a few days total, but, you know, I have -- I have no
6 reason to contradict the -- the plaintiff's claim that it will
7 take a week to put on the case.

8 THE COURT: Okay. Here's what I'm going to do.
9 It's simply for my own planning purposes. I'm going
10 to -- This order will indicate that the court estimates that
11 it will take five to seven days to try this case, and that
12 includes from beginning to end.

13 Now, having said that, once we start the trial, we
14 will continue with it until we are done, whether it takes four
15 days, five days, seven days, eight days, whatever. In other
16 words, I'm not going to put any of you on a clock, and I'm not
17 going to impose any drop-dead date by which this case needs to
18 be completed. I will say this, however. We try a lot of
19 cases in my court, and cases -- everybody, I think, is always
20 surprised how quickly things go. And so my impression is that
21 you can usually take lawyers' estimates and take about 75 --
22 50 to 75 percent of that is how long the case will actually
23 take to try. Now these are all matters that we'll discuss in
24 detail when we get the final pretrial conference.

25 But the other thing I want to tell you about this

1 April 22nd date is that this is a No. 1 trial setting. The
2 only thing that could potentially interfere with it would be a
3 criminal trial. And, of course, in federal court we're
4 subject to a speedy trial clock, so on any given Monday I've
5 usually got at least one, sometimes four or five cases, set
6 for criminal trials. 98 percent of those end up in plea
7 agreements, so we never try those cases.

8 If, for some reason, I have a criminal trial that
9 ends up having to proceed on April 22nd, I would ask one of my
10 fellow Article 3 judges to take the criminal trial, and I
11 would reassign the criminal trial to one of my colleagues. I
12 will not, under any circumstance, be reassigning your case, so
13 you're all stuck with me until the end.

14 So this case will be trialed -- tried on April 22nd.
15 We'll have the final pretrial conference -- and again, all of
16 these dates will be spelled out in the order that I will be
17 issuing this afternoon -- we'll have the final pretrial
18 conference on April 11th, 2024 at 2:30 p.m., and that will be
19 here in Missoula in the courthouse here, and I will expect the
20 parties and counsel to be present in person for the final
21 pretrial conference.

22 Now, on April 4th, a number of things will need to
23 occur. First you'll need to file the final pretrial order,
24 proposed jury instructions, proposed voir dire questions, and
25 trial briefs. If you want to have realtime available to you

1 at counsel table, you'll need to give the court reporter
2 notice of intent to use realtime also on April 4th.

3 Now, Mr. Rhodes, do you know what "realtime" is?

4 MR. RHODES: This is the defendant. No, I do not.

5 THE COURT: Okay. So what realtime is, as you
6 know -- as I'm sure you know, the court reporter will be
7 taking a -- making a record of everything that occurs during
8 trial. In our courtroom we have lots of screens, we have a
9 lot of electronics everywhere, including at counsel table. If
10 you elect to have realtime, what that means is you would be
11 able to have available to you at counsel table the same
12 transcript of the proceedings being taken by the court
13 reporter that I'm seeing up here on the bench.

14 So, in other words, while things are happening in
15 the courtroom, the court reporter obviously is transcribing,
16 and that appears -- I have, for instance, an iPad up here on
17 the bench where I'm able to read virtually simultaneously
18 what's being said in the courtroom. You would have the same
19 ability to have that technology available to you at counsel
20 table if you elected to have realtime.

21 Now, having mentioned this, there's a charge for
22 that, and I don't know what it is, but you would need
23 to -- that's why I would ask you to give notice on April 4th
24 and -- to the court reporter -- to our court reporter here in
25 Missoula your intent to use realtime, and then she would

1 contact you directly in terms of what the cost of that is,
2 whether or not, in fact, you really want it.

3 The name of our court reporter here in Missoula is
4 JoAnn -- that's capital J, small o, and capital A, double n
5 Corson, C-o-r-s-o-n. So you would need to give notice to her.
6 And the other thing you will need to do on April 4th is if you
7 want to call witnesses live but by videoconference, then you
8 need to give notice to our IT supervisor on April 4th of
9 our -- of your intent to call witnesses live but remotely
10 through video.

11 And the name of that individual is? Do we give him
12 Bob Mund's name?

13 THE CLERK: Yes.

14 THE COURT: Yeah. Bob Mund, M-u-n-d. And the best
15 way to handle this is -- is just probably to serve notice in
16 -- in terms of the pleading that you would file on April 4th
17 or you certainly could contact them directly.

18 On the subject of calling witnesses remotely but
19 live, I have absolutely no objection to that. And, in fact,
20 my experience has been that jurors do not attach any less
21 significance to the testimony that's provided by a witness
22 speaking to them on a large television screen than they do to
23 that witness under oath sitting in the witness stand. And we
24 have, as I indicated, a lot of technology in this courtroom,
25 so the ability to -- to have examinations and, course,

1 pandemic, Zoom, everything else, we've gotten pretty good at
2 this. So if you wish to call witnesses live but by
3 videoconference, no objection from me. You'll just simply
4 need to make sure on April 4th that you let our IT person know
5 that you want to do that and then he will begin the process of
6 working with you to coordinate between the remote location and
7 our court to make sure that our technology is all compatible
8 and everything will come off seamlessly.

9 So those are the things that need to happen on
10 April 4th. Which means, then, on March 28th, the week of
11 March 28th, you'll need to get your heads together to come up
12 with the final pretrial order and then we will have two
13 separate motions deadlines.

14 So discovery ends on December 15th, then there will
15 be a fully briefed motions deadline -- that's all motions
16 except motions in limine -- of January 16th, 2024, and then
17 the motions in limine deadline, also fully briefed, will be
18 March 8, 2024.

19 Now, "fully briefed" is defined in this order, but
20 what it means is is that the opening brief and the response
21 brief need to be filed by that date. So if you are the moving
22 party, you need to count back and make sure that you provide
23 the other side sufficient time to get the response brief filed
24 by the deadline. Reply briefs are optional, they can come in
25 provided they're timely under the rules. Those can be filed

1 after the deadlines. So that's the scheduling order which
2 will be contained in the order that I issue -- or the
3 scheduling deadlines that'll be contained in the order that
4 I'm going to send out to you.

5 Now, just because there's a motions deadline does
6 not mean that you have to wait until that motions deadline to
7 file substantive motions. If you've got your substantive
8 motions ready and you want to file them earlier, all the
9 better, gives me more time to read everything and get a ruling
10 out before the final pretrial conference.

11 At the end of paragraph 1 of the order that you're
12 going to get, which will contain these deadlines, you will
13 read the following in bold type. "The parties may stipulate
14 to the extension of any of the above deadlines that precede
15 the motions deadline without a court order. However, parties
16 seeking a continuance of the motions deadline or any
17 subsequent deadline must file a motion with the court. Such
18 motions will not be granted absent compelling reasons, which
19 do not include delay attributable to the party's stipulated
20 extensions."

21 So if you want to extend a deadline to amend
22 pleadings without leave of court, the deadlines to disclose
23 experts or the discovery deadline and you're able to reach an
24 agreement between yourselves that you memorialize in some
25 fashion, letter, email, I don't care, then you do not need to

1 come to me and ask that the scheduling order be modified
2 consistent with your stipulated extensions of those deadlines.
3 In other words, whatever you agree to up to the motions
4 deadline is fine with me. When we get to the motions
5 deadlines, I start to get -- I start to get a little anxious
6 because I need to have enough time to get rulings out on your
7 various motions, ideally before the final pretrial conference,
8 so that you all know what this case will look like in terms of
9 trial.

10 Any questions about anything we've talked about so
11 far? Mr. Rhodes?

12 MR. RHODES: Yes, I have a couple of questions.
13 This is the defendant.

14 Regarding the conference that is being scheduled for
15 April 11th, the in-person conference, is that an issues
16 conference?

17 THE COURT: It's the final pretrial conference, and
18 at that time what I will do -- I mean, that's the conference
19 where we -- No. 1, I will -- you will have -- you will have
20 filed with me the final pretrial order, and so at that time I
21 will make sure that there isn't any further amendments to the
22 final pretrial order and I will sign it, and then we're gonna
23 talk about the rules of engagement as it relates to the trial.

24 Now, it may be that -- I mean, in connection with
25 the final pretrial order I'll have lists of witnesses, I'll

1 have lists of exhibits, it may be that we could pre-admit some
2 exhibits, although generally I don't do that because in a jury
3 case the only exhibits I allow to go to the jury are those
4 that are actually admitted during trial and the subject of
5 trial testimony, so I'm a little hesitant to sort of blanket
6 admit a whole bunch of exhibits that may not see the light of
7 day during trial.

8 But in any event, we'll talk -- we'll talk about,
9 you know, the witnesses, we'll have a better idea how long the
10 trial will take, we'll probably have some discussion about
11 exhibits, there may be some legal issues, evidentiary issues,
12 matters that we need to discuss, we'll talk about jury
13 selection. In other words, we'll -- we'll do all the work
14 that we need to do in order to get the case prepared to try it
15 on the 22nd of April.

16 Does that answer your question, Mr. Rhodes?

17 MR. RHODES: This is the defendant. I believe it
18 answers my question. Let me just go ahead and be more
19 specific with it.

20 So it sounds like you're saying that, yes, that is
21 the time at -- which it's appropriate to bring up issues of
22 limiting testimony to that which is relative to the complaint.
23 Is that correct?

24 THE COURT: Well, not exactly. I indicated that
25 there would be a motions in limine deadline on March 8, 2024.

1 My experience has been that the best time to raise issues
2 where you seek to limit evidence in trial would be in the form
3 of a motions in limine, and --

4 MR. RHODES: All right.

5 THE COURT: -- and that would be the best time for
6 you, probably, to raise that issue. Now, I will tell you that
7 with some frequency sometimes I reserve ruling on motions in
8 limine until trial, until I've heard the evidence, until I've
9 got some sense as to where we are, but the time to raise
10 issues that you have regarding evidence, the first opportunity
11 that you will have to do so, Mr. Rhodes, is on March 8th, and
12 I would suggest that's probably the best time to key those
13 issues up so that I'm aware of them, the government can
14 respond, and they may file motions in limine of their own.
15 And then if necessary I can have a hearing, but -- to the
16 extent that I can issue rulings on evidentiary issues before
17 trial so that you all know what you can and can't do as it
18 relates to certain evidence, then I endeavor to do so. But
19 the best way to tee that up would be to file a motion in
20 limine. Although you are certainly free to object to any
21 evidence --

22 OPERATOR: Good-bye.

23 THE COURT: Did I lose everybody?

24 (Recess taken from 2:09 p.m. to 2:11 p.m.)

25 THE COURT: This is Judge Christensen again. Do I

1 still have everybody on the phone?

2 MR. WADDEN: Michael Wadden's here.

3 THE COURT: And Mr. Runkle? Is Mr. Runkle on the
4 phone? How about Mr. Runkle? How about Mr. Rhodes?

5 MR. RHODES: The defendant is here.

6 THE COURT: Oh, okay, good. So we've got two out of
7 three. I don't know what happened there, but let's -- do we
8 need to wait for Mr. Runkle, Mr. Wadden?

9 MR. WADDEN: No, this is Mr. Wadden. That's no
10 problem. He may be joining shortly, but I -- I can handle it
11 while he's off.

12 THE COURT: Okay. I was answering Mr. Rhodes'
13 question about evidentiary motions to limit evidence. I think
14 I answered that, and I think Mr. Rhodes, you had another
15 question.

16 MR. RHODES: I did. I believe I asked two
17 questions. And this -- this is the defendant, and I believe
18 that you did answer my -- my first question.

19 My second question has to do with the court's
20 offer -- potential offer of using what you describe as
21 realtime. I understand the deadline for contacting the court
22 reporter about that, but I have a question about whether
23 that -- I -- I have a question about whether that would
24 satisfy the defendant's need, and I'll explain what that is.

25 I anticipate or I -- I should say as a pro se

1 defendant I'm at a disadvantage -- a substantial disadvantage
2 when it comes to my testifying on the stand. Particularly
3 it's anticipated that the plaintiff will call the defendant as
4 a witness. And as the witness is answering the plaintiff's
5 questions, he has no attorney that is able to take notes on
6 what has been asked so that he can then be addressed in
7 cross-examination, because the defendant is cross-examining
8 himself. I'm assuming the defendant does not have the ability
9 to take notes while he's on the stand or would not be allowed
10 to take notes on the stand. So my question becomes does the
11 realtime transcription then provide the defendant with a
12 record immediately after conclusion of the plaintiff's
13 questioning that he would be able to then refer to in his
14 cross-examination of himself?

15 THE COURT: Well, Mr. Rhodes, let me -- let me
16 attempt to answer that question. What you get with realtime,
17 as I understand it, is you get -- you are able to read while
18 you're sitting at counsel table the words that are being
19 communicated in the courtroom virtually simultaneously and
20 they scroll across a screen. What you seem to be referring to
21 is whether or not you would get a hard transcript, a paper
22 transcript. And I believe, and here I may -- I -- I -- I
23 would suggest that the best person to answer this question
24 would be the court reporter -- but I believe you could have
25 available to you -- at the end of the day you could get a

1 transcript of the day's proceedings if you have realtime.

2 Now, what you're talking about -- what you're
3 talking about is what happens if you're called as an adverse
4 witness in the government's case in chief and you're subjected
5 to direct examination and then you wish to conduct
6 cross-examination of yourself, as you describe it. Would you
7 have available to you then through realtime something that
8 would be a hard copy transcript, et cetera, et cetera? I
9 don't know, but I don't think so. I think what you would have
10 to do is conduct your examination of yourself following direct
11 exam based upon either -- you know, based upon your
12 recollection. Or if you wanted to take some notes while
13 you're being examined, provided it wasn't -- it didn't really
14 interfere with the flow of what we were doing but just jot
15 things down to -- to -- for memory purposes, I probably would
16 allow that while you're on the witness stand.

17 So what I would suggest is this. Think about what
18 your needs are, and -- and then if you wish to contact the
19 court reporter and discuss these things with her, you could do
20 so, but the time for us to resolve these kinds of issues and
21 how we're going to mechanically proceed with testimony would
22 be at the final pretrial conference, which is set for
23 April 11th.

24 Anything further -- Go ahead.

25 MR. RHODES: This is the defendant. I believe you

1 answered my question. It wasn't necessarily I would have a
2 hard copy available in realtime, but it was sort of really
3 intuitive the broader question about how to mitigate the
4 disadvantage of not having an attorney to take notes while I'm
5 under direct examination so that I can address each of those
6 issues, if desired, under my own cross-examination, which I'm
7 assuming would be so lengthy, the questioning by the
8 plaintiffs, that I don't suspect that my memory would be
9 sufficient. And so your suggestion of one possibility of
10 being allowed to take notes on the stand, provided they don't
11 interrupt the flow of testimony, I believe, seems acceptable,
12 but I'm also open to other suggestions by the court if it has
13 experience with other potential solutions.

14 So I have that third and final question, if I may?

15 THE COURT: You may.

16 MR. RHODES: In a previous filing -- I forget -- I
17 believe it was my answer to the complaint -- the defendant
18 requested live streaming of the proceedings which defense
19 understands does not involve testimony, but the other
20 potential part of the proceedings such as opening and closing.
21 Do I -- Does the court require the defendant to make that
22 request via some other method?

23 THE COURT: Well, generally -- I mean, this is an
24 open courtroom, Mr. Rhodes, it's a public proceeding. Anybody
25 that wants to come into the courtroom and observe the

1 proceedings is more than welcome. It's not our practice to
2 livestream trials, and, in fact, I haven't done so in 12 years
3 and I'm unaware of any case that's been livestreamed out of
4 this courtroom, so that's not something that we typically do.

5 MR. RHODES: My understanding is that
6 Missoula -- the district court there was one of the courts for
7 that pilot program, so I believe that you haven't done it
8 before, but I was led to believe that it was available, at
9 least up until recently. And while I understand that it is an
10 open courtroom, that obviously is restricted to people that
11 are either in the Missoula area who are willing to incur the
12 expense of traveling there. And based on the public interest
13 involved in the trial, especially given that we're talking
14 about the FCC, public agency that -- that is the plaintiff,
15 I -- I thought that there would be value or -- or that I'd be
16 able to -- to request it.

17 So is that still -- is the Missoula District Court
18 still part of that pilot program --

19 THE COURT: You know --

20 MR. RHODES: -- of livestreaming a trial if
21 available?

22 THE COURT: -- that's a good question, Mr. Rhodes, I
23 don't know, and I'm not gonna be able to answer that question
24 this afternoon, but let's -- let's do this. Let's keep the
25 issue of livestreaming on the table, and -- and we can

1 decide -- and we can further discuss it when we get closer to
2 trial and see if we can't reach some sort of accommodation.
3 All right.

4 MR. RHODES: This is the defendant. That sounds
5 acceptable.

6 THE COURT: All right. Thank you.

7 Let's talk -- Mr. Wadden, Mr. Runkle, did you have
8 any questions about anything we've discussed so far?

9 MR. RUNKLE: No questions from the government, Your
10 Honor. Thank you. That was Mr. Runkle.

11 THE COURT: Okay. Let's -- Let's talk about a
12 couple of other things here that are the subject of the order
13 that you're going to receive from me. Has there been any
14 exchange of discovery in terms of documents at this point in
15 time?

16 MR. RUNKLE: This is Mr. Runkle, Your Honor. There
17 has not been -- There's been preliminary disclosures and we
18 are preparing a document production that is not quite ready
19 yet, so there will be a document production from the
20 government and we will soon take some document discovery from
21 Mr. Rhodes. But the -- the specific answer to your question
22 is no, there hasn't been documents in discovery exchanged yet.

23 THE COURT: Okay. Let me -- Let me tell you why I
24 asked that question. You're going to see that there is
25 language in the scheduling order that I'm going to issue this

1 afternoon on numbering of documents produced in discovery. It
2 basically covers two areas. The first -- Or two issues. The
3 first issue is whatever numbering system you arrive at in
4 terms of how you paginate or number documents produced in
5 pretrial disclosure and in discovery, utilize the same
6 numbering system throughout the case so that we don't have
7 different numberings for the same exhibit -- in the document
8 in depositions or in whatever, and so use the same numbering
9 system throughout the case including when you number these
10 documents as exhibits for your -- for the trial exhibits.

11 The reason for this is obvious. I don't want to
12 have to sort out different numberings for exhibits. Let's
13 assume, for example, that you perpetuate somebody's testimony
14 through a deposition so that they don't need to be called live
15 at trial, and you use certain documents in connection with
16 that process. And if those documents are numbered
17 differently, then the same document is numbered as a trial
18 exhibit, then we've got a translation and confusion issue. So
19 that's -- you'll see language on that.

20 The second thing that we ask you to do, we don't
21 mandate it, but we use our electronics extensively in this
22 courtroom, particularly for exhibits, and so we -- and -- and
23 at the end of the trial we utilize what's called the Jury
24 Evidence Recording System, acronym is JERS, JERS, and this is
25 a system that we utilize whereby my courtroom deputy, when

1 documents are -- when exhibits are admitted, they find their
2 way into JERS, and then when the jury goes back to deliberate,
3 we do a brief tutorial with them, our IT supervisor goes in,
4 spends about two minutes with them and gets them up to speed,
5 and then they are able to electronically retrieve all of the
6 documents that have been admitted as exhibits at trial and
7 look at them simultaneously together on a large flat screen in
8 the jury room.

9 So we use JERS, we love JERS, and so we ask when you
10 paginate or number the documents that you are producing in
11 discovery, that you endeavor to utilize a numbering system
12 that is compatible with JERS. Now, most of the numbering
13 systems that you use are compatible with JERS, but you will
14 see a reference in the order to the court's website
15 specifically where there's a discussion regarding JERS and the
16 specifics.

17 An alternative is if you want to shortcut that whole
18 process is whoever's gonna -- whoever's concerned about this,
19 Mr. Rhodes or whoever in the government's office that would be
20 concerned about this is you can contact Amanda Goodwin, again,
21 my courtroom deputy, judicial assistant, and ask her which
22 number -- ask her about numbering systems that are compatible
23 with JERS. Again, it's not a mandate, it's a -- it's a
24 request.

25 The other issue -- One of the other issues I wanted

1 to talk to you about is protective orders. I have a -- I have
2 pending some -- a motion that's been made by the government to
3 adopt a particular protective order in this case. I
4 understand that there were objections to some language in that
5 protective order which it's been described in the -- in the
6 filing that's been made by the government. And then
7 yesterday, Mr. Rhodes, you filed your opposition to the motion
8 to enter a protective order, and unfortunately I haven't had
9 an opportunity to study that or to read it, even. So what I'm
10 suggesting to both of you is I understand that there's a
11 request for a protective order, I understand there's some
12 issues about the -- the substance of that order, and I'll
13 read -- I'll read the briefs and I'll get an order out on
14 that, so we can address -- I'll address that here after we get
15 done with this conference today, in the next couple weeks, so
16 that you can start with your discovery.

17 The other matters that I wanted to discuss with you
18 that are identified in -- in the order that you're going to
19 receive from me today setting this case for trial, the -- the
20 primary substantive area that the order discusses that I
21 haven't yet addressed with you this afternoon is the subject
22 of experts, and we follow -- I follow Rule 26 as it relates to
23 experts. So anything that's said in this scheduling order
24 that you'll receive is simply a reframing of what's expected
25 and required under Rule 26. As long as you comply with

1 Rule 26(a)(2)(B) for retained experts, (a)(2)(C) for
2 nonretained experts, you're gonna be in good standing with me.
3 My policy and practice is if an opinion is appropriately
4 disclosed in an expert's report, then that opinion is
5 admissible at time of trial. If an opinion is not disclosed
6 in the expert's report and is objected to by the opposing
7 party, then it is unlikely that that opinion will see the
8 light of day at trial.

9 So here's how this plays out. Let's assume for
10 purposes of discussion that the United States calls an expert,
11 they elicit a particular opinion from that expert.
12 Mr. Rhodes, you object, and the objection is, "Your Honor,
13 this is an undisclosed opinion." At that time I will ask the
14 counsel for the government to tell me where in the expert's
15 report the opinion is found or reasonably contained within
16 opinions in the report, and if the opinion is in the report,
17 it will be admissible. If it's not in the report, it will not
18 be allowed and will not be admitted. Pretty straightforward.
19 I got a little wiggle room, and that is whether or not it's an
20 opinion that's reasonably contained within opinions expressed
21 in the report, but usually this is fairly straightforward, but
22 I just wanted to alert you to the fact that I do not view
23 experts expanding their opinions in the course of their
24 depositions beyond opinions contained in the report -- I do
25 not view those expanded oral opinions in depositions as being

1 appropriately disclosed under Rule 26.

2 Any questions about that?

3 MR. RUNKLE: None from the government, Your Honor,
4 although I -- I assume if there's a Rule 702 objection, that
5 the court would be amenable to hearing that as well.

6 THE COURT: Oh, of course. I mean, any other -- I
7 mean, all objections are reserved as it relates to -- to
8 experts, but I was speaking specifically about the objection
9 that may come up that it's undisclosed opinion, and I just
10 wanted to make sure that you understood what my view of that
11 is on that subject.

12 Now, one of the other paragraphs in this order that
13 you're going to receive from me, which is paragraph 7, and I'm
14 just going read it to you and then we can talk about it.

15 This paragraph is entitled [As Read]: "Foundation &
16 authenticity of discovery items. Pursuant to Federal Rule of
17 Civil Procedure 16(c)(2)(C), the parties stipulate to the
18 foundation and authenticity of all discovery items produced in
19 pretrial disclosure and during the course of discovery.

20 However, if counsel objects to either the foundation or the
21 authenticity of a particular discovery item, then counsel must
22 make a specific objection to opposing counsel in writing prior
23 to the deadline for the close of discovery. If a discovery
24 item is produced and the producing party objects either to its
25 foundation or authenticity, the producing party shall so state

1 in writing at the time of production. This stipulation
2 extends only to the document itself, not to foundation for
3 witnesses discussing the document at trial. All other
4 objections are reserved for trial."

5 Now, that's a lot to absorb, particularly,
6 Mr. Rhodes, for a nonlawyer. So let me see if -- Maybe you
7 understood this completely, but let me sort of break it out.

8 So what this -- what this paragraph says is that you
9 all are agreeing that anything you produce in discovery, that
10 it is -- that you're stipulating to the foundation and
11 authenticity of the document. In other words,
12 you're -- you're waiving any objections you have that what is
13 being produced is, in fact, not an authentic copy of the
14 particular document or that it doesn't purport or state what
15 it represents to state, in effect. And it provides a
16 procedure if, in fact, you do object to the foundation or
17 authenticity of the document what you need to do, and then it
18 goes on to state that this -- this provision applies only to
19 the document itself, not to foundation for witnesses
20 discussing the document at trial.

21 So even though a document is deemed authentic and
22 for which no foundation needs to be laid for the document
23 itself, my expectation is at trial that before a document is
24 admitted, that there needs to be a witness that has the
25 requisite knowledge about the document in order to lay

1 foundation for it to be admitted as a trial exhibit. And then
2 any other objections, of course, are reserved for purposes of
3 trial.

4 The most typical example that I can give you is
5 frequently in cases -- probably not in this one -- but
6 frequently in cases there are medical records that are
7 admitted as exhibits at trial. This paragraph provides that
8 the medical record itself is deemed authentic. In other
9 words, there's no challenge to the content of the record as to
10 whether or not it's truthful and an accurate representation.
11 In other words, it's not a forged document, it hasn't -- it
12 isn't a document that's been doctored or manipulated digitally
13 or something of that sort. It is, in fact, the authentic
14 document. And that avoids the need for the parties to have to
15 go to every doctor's office where these records came from and
16 depose somebody in the office who would testify that, in fact,
17 these are true and accurate copies of the medical records, so
18 it's a timesaver for everybody. It also is a -- is an
19 objection that's being waived pursuant to this paragraph, that
20 being the objection of authenticity as it relates to the
21 document.

22 I don't know if this is going to be an issue in this
23 case, I can't predict that, but if -- bottom line is this,
24 Mr. Rhodes. In terms of documents that are produced to you by
25 the government in discovery, if in the course of going through

1 those you believe that a particular document has been
2 manipulated, it's been doctored, it is not, in fact, a true
3 and accurate copy of the document itself, then you need to
4 object, in writing, specifically as to the document -- you
5 need to object in writing specifically as to the document to
6 the government within the time to complete discovery so that
7 if necessary a deposition could be taken of some recordkeeper
8 somewhere that could establish that, in fact, it is an
9 authentic -- the document is authentic.

10 Mr. Rhodes, did that make sense to you?

11 MR. RHODES: This is the defendant. Yes, that seems
12 well explained, and I believe that I understand.

13 THE COURT: All right. Okay. And I assume,
14 Mr. Runkle and Mr. Wadden, you understood what I was talking
15 about there as I referenced paragraph 7.

16 MR. RUNKLE: Yes. This is Mr. Runkle. We -- We
17 understand. Thank you, Your Honor.

18 THE COURT: All right. Now, I -- as I indicated to
19 you, you have a No. 1 trial setting. My view of this case
20 is -- and my role in this case is obviously to rule on any
21 motions that you file, sort out any discovery disputes that
22 you might have, and otherwise prepare this case so that it can
23 be tried efficiently and fairly on April 22nd of 2024.
24 There's nothing about the scheduling order in this case,
25 there's nothing about the trial setting that requires that you

1 participate and engage in any sort of mediation or settlement
2 process. I don't know if there's any possibility that the
3 parties could reach common ground and resolve this case. I
4 don't need a representation from anybody this afternoon as to
5 the prospects of that possibility.

6 I just want to make two points. The first one is,
7 your No. 1 trial setting is not contingent upon you engaging
8 in mediation or settlement. Having said that, if you wish to
9 engage in a mediation or settlement and you want the
10 assistance of this court, all you need to do is file a joint
11 motion for a settlement conference. If I get such a motion, I
12 would refer this case to one of our United States magistrate
13 judges to conduct a mediation. Typically I would refer the
14 case to our magistrate judge here in Missoula, but because
15 Judge DeSoto already has had some involvement in this case, I
16 would not refer it to her. So it would go to one of our other
17 two magistrate judges: Judge Johnston in Great Falls or
18 Judge Cavan in Billings. If you do not otherwise request a
19 particular magistrate judge, I would probably refer to
20 Judge Johnston since he conducts more mediations than
21 Judge Cavan. They both do an terrific job, but Judge Johnston
22 also, if it's a Missoula case, which this one is, he's more
23 than willing usually to travel to Missoula for the mediation.

24 Now, that's all I'm gonna say about that. And I
25 just wanted you to know that we have resources that are

1 available to assist you in that process, they're free of
2 charge to you, you don't have to pay the magistrates anything
3 to conduct settlement conferences, they do a terrific job, and
4 all you need to do if you want to engage in that process is
5 file a motion with the court and I will assign the case to the
6 magistrate judge for mediation and then I'm -- I don't -- I'm
7 not involved in that process. He sets the schedule, he sets
8 the rules of engagement as it relates to mediation, and I
9 simply find out whether the case settled or it didn't. And
10 again, I don't care if you want to mediate the case or if you
11 want to have a trial, it doesn't make any difference to me.

12 So I think I have covered pretty much everything I
13 want to cover. Mr. Runkle, Mr. Wadden, do you have any
14 questions of me?

15 MR. RUNKLE: This is Mr. Runkle. I don't believe we
16 have any questions at this point, Your Honor. Thank you for
17 your thoroughness today.

18 THE COURT: Okay. And Mr. Rhodes, do you have any
19 questions -- additional questions of me?

20 MR. RHODES: This is the defendant. I have no
21 further questions.

22 THE COURT: All right. Well, folks, well, you'll be
23 getting an order from me here in the next hour or so outlining
24 all of this information, and -- and more, and I thank all of
25 you, and we'll -- we'll proceed here according to the court's

1 scheduling order. Thank you very much. We're in recess.

2 (Court adjourned at 2:41 p.m.)

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REPORTER'S CERTIFICATE

I, Mary R. Sullivan, a Registered Merit Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not an attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana on July 9, 2023.

/s/ Mary R. Sullivan

Mary R. Sullivan
United States Contract Court Reporter